

**IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI**

STATE OF MISSOURI <i>ex rel.</i>	)	
Sprint Spectrum L.P. d/b/a Sprint PCS;	)	
	)	
vs.	)	Case No. 01CV323740
	)	
THE MISSOURI PUBLIC SERVICE COMMISSION	)	
Respondent	)	
	)	
STATE OF MISSOURI <i>ex rel.</i>	)	
Southwestern Bell Wireless LLC;	)	
	)	
vs.	)	Case No. 01CV323803
	)	
THE MISSOURI PUBLIC SERVICE COMMISSION	)	
Respondent	)	
	)	
STATE OF MISSOURI <i>ex rel.</i>	)	
Cellco Partnership and Cybertel Cellular Telephone	)	
Company d/b/a Verizon Wireless	)	
	)	
vs.	)	Case No. 01CV323804
	)	
THE MISSOURI PUBLIC SERVICE COMMISSION	)	
Respondent	)	
	)	
STATE OF MISSOURI <i>ex rel.</i>	)	
AT&T Wireless Services, Inc.,	)	
Relators,	)	
	)	
vs.	)	Case No. 01CV323815
	)	
THE MISSOURI PUBLIC SERVICE COMMISSION	)	
Respondent	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

The Court having reviewed the record and briefs presented, and having considered the oral argument of the parties, makes these Findings of Fact, Conclusions of Law, and Judgment. As explained below, the Court finds that the small company wireless termination tariffs at issue in this case are lawful and reasonable, and the Court upholds the Commission's *Report and Order* which approved the small companies' wireless termination tariffs.

### **FINDINGS OF FACT**

1. Sprint Spectrum L.P. d/b/a Sprint PCS, Southwestern Bell Wireless LLC, Cellco Partnership and Cybertel Cellular Telephone Company d/b/a Verizon Wireless, and AT&T Wireless Services, Inc. (Relators) are Commercial Mobile Radio Service (CMRS) providers or "wireless carriers" that operate in the state of Missouri.

2. Respondent Commission is an executive state agency of the State of Missouri within the Department of Economic Development and, among other things, is charged by law with regulating the rates and services of telecommunications companies as provided in Chapters 386 and 392 of Missouri's Revised Statutes.

3. Intervenor Mark Twain Telephone Company et al.<sup>1</sup> is a group of small rural telephone companies that provide local telecommunications services and exchange access service in rural areas of the State of Missouri.

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<sup>1</sup> Mark Twain Telephone Company et al. is comprised of BPS Telephone Company, Citizens Telephone Company of Higginsville, Mo., Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

4. Intervenor Alma Telephone Company et al.<sup>2</sup> is a group of small rural telephone companies that provide local telecommunications services and exchange access service in rural areas of the State of Missouri.

5. Intervenor Southwestern Bell Telephone Company (SWBT) is a large incumbent local exchange telephone company (ILEC) providing local telecommunications services and exchange access service in the State of Missouri. SWBT also offers a service to wireless carriers that allows the wireless carriers to send traffic to the exchanges of the small rural telephone companies.

6. Intervenor Office of Public Counsel was created by the Missouri legislature to represent the public and small businesses in proceedings before the Commission.

7. On February 8, 2001, the Commission issued its *Report and Order* in Case No. TT-2001-139<sup>3</sup> approving the wireless termination service tariffs filed by Alma Telephone Company et al. and BPS Telephone Company et al. ("the small companies"). The Commission's *Report and Order* concluded that the small companies' tariffs were lawful and determined that the small companies' tariff rates were just and reasonable.

8. The wireless carriers sought review of the Missouri Public Service Commission's Feb. 8, 2001 *Report and Order* in Case No. TT-2001-139, and the wireless carriers filed Petitions for Writ of Review with this Court pursuant to §386.510 RSMo 2000.

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<sup>2</sup> Alma Telephone Company, et al. is comprised of Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Inc.

<sup>3</sup> *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*

9. These cases were docketed as Civil Case Nos. 01CV323740, 01CV323803, 01CV323804, and 01CV323815. On June 18, 2001, the cases were consolidated for purposes of review under the lead Case No. 01CV323740.

10. In accordance with local Rule 71 and this Court's scheduling orders, Relators filed their Initial Briefs on or before May 31, 2001. Respondent Commission and various Intervenor filed Briefs on or before July 2, 2001. Relators filed their Reply Briefs on July 12, 2001.

11. Oral argument took place before the Court on September 28, 2001.

12. Wireless termination tariffs. SWBT and Rock Port Telephone Company have tariffed a wireless termination service in Missouri for a number of years. SWBT's Wireless Interconnection Tariff was approved as a part of a rate case, but it has gone through numerous changes and revisions, including changes to rates, outside the context of a full rate case since it first went into effect on January 1, 1984. SWBT's Wireless Interconnection Tariff contains a set of procedures, rates, and terms that are used in the absence of an approved interconnection agreement between SWBT and a wireless carrier. SWBT's wireless tariff allows SWBT to charge a rate for the termination of wireless traffic in the absence of an interconnection agreement. SWBT's tariffed wireless termination rates are neither forward-looking nor reciprocal. In fact, SWBT's tariffed rates for the termination of wireless calls are in some cases higher than their access rates and can be more than 4 cents per minute (roughly \$0.043).

13. From 1990 until February 4, 1998, SWBT terminated traffic from wireless carriers that had not established separate interconnection agreements with SWBT to the small companies pursuant to SWBT's Wireless Interconnection Tariff. However, SWBT refused to pay the small companies for the wireless traffic that was terminated to them. In Cases No.

TC-96-112, TC-98-251, and TC-98-340, the Commission determined that access tariffs did apply to this traffic during this time period. Accordingly, the Commission found that SWBT was responsible for the payment of terminating access for these calls.

14. Subsequently, the Commission allowed SWBT to modify its tariff so that it provided only a "transiting" function for this traffic. However, in Case No. TT-97-524, the Commission insisted upon the following tariff language:

Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic.

15. In Case No. TT-97-524, the Commission also stated that it would "not assume that the wireless carriers will violate the tariff by sending wireless traffic in the absence of an agreement." The wireless companies involved in this docket each point out that they do not currently use SWBT's tariff. Rather, SWBT's handles their traffic through negotiated interconnection agreements that supersede the application of the tariff. However, wireless traffic is being delivered to the exchanges of the small companies in the absence of an agreement. Because there are no agreements in place between the small companies and the wireless carriers, the small companies are not being compensated for the wireless traffic that is transited and terminated to them via SWBT.

16. The small companies must be compensated for the use of their facilities. The wireless companies do not deny that the small companies should be compensated for terminating the wireless carriers' calls, but currently the small companies receive nothing for the calls that are terminated to their exchanges. No party denies that the small companies incur traffic sensitive costs for each of the wireless companies' calls that they terminate, and as wireless

traffic continues to grow, the small companies will incur more and more of these new expenses over and above their current costs. Until the small companies receive compensation for the termination of this traffic, however, these costs will have to be recovered from other sources.

17. On August 16-18, 2000, the small companies filed the wireless termination tariffs at issue in this case. The tariffs were new tariffs designed to establish the rates, terms and conditions applicable to the wireless carriers for the termination of intra-MTA wireless calls over the indirect connection with the wireless carriers via SWBT.

18. The small companies' proposed tariff rates are just and reasonable. The tariff rates were based on a composite of each of the small companies' current intrastate intraLATA access rates for switching and transport (i.e. "traffic sensitive") functions plus two cents per minute to contribute to the costs of using the companies' local loop facilities. These rates were chosen after the small companies had developed, reviewed, and considered rates based on the HAI forward-looking cost model. Although the small companies developed, reviewed, and considered rates based on their forward-looking costs produced by the HAI model, the model produced rates for the small companies that were, in most cases, higher than the rates proposed in the small companies' tariffs.

19. The rates proposed by the small companies range from roughly \$0.05 to \$0.075 per minute, and these rates would be charged to the wireless carrier originating the traffic terminating to the small company via the SWBT transiting arrangement. (Ex. 3, Schedule RCS-2) These rates are typically lower than the small companies' access rates and lower than the rates produced by the HAI forward-looking cost model. Conversely, SWBT's Wireless Interconnection Tariff includes rates that are higher than SWBT's access rates.

20. The small companies' proposed rates are not out of line with their forward-looking costs, the rates in SWBT's wireless interconnection tariff, or the rates that the wireless carriers have negotiated with small companies in other states. For example, Sprint PCS' own evidence shows that it has negotiated rates with Minnesota's small companies that average more than \$0.03 per minute, with the highest being more than \$0.045 per minute.<sup>4</sup> The testimony of ALLTEL Communications, Inc. ("ACI") reveals that ACI agreed to pay Alma Telephone in Georgia nearly 5 cents per minute (\$0.0495).<sup>5</sup>

21. Moreover, if the wireless carriers do not like the small companies' tariffed rates, then the Telecommunications Act of 1996 allows them to negotiate other rates with the small companies.

22. The small companies' rates include two cents per minute to contribute to the costs of using the small companies' local loop facilities. No party has disputed the fact that the small companies' local loop facilities are used by the wireless carriers to terminate wireless calls. Past Commission practice indicates that carriers utilizing the loop facilities should make a contribution to the costs, and the Commission has previously ruled that it is "patently absurd" for carriers to be "provided with absolutely free access to the local loops of local exchange telephone customers."<sup>6</sup> When the Commission examined SWBT's wireless tariff in Case No. TR-90-144, it concluded that wireless carriers "are as responsible for the CCL component of the

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<sup>4</sup> Ex. 7, Schedule B.P.7

<sup>5</sup> Ex. 1, Schedule 1

<sup>6</sup> *Access Charge Rate Structure and Methodology and IntraLATA Toll Settlements*, Case No. TR-83-253 and TR-83-288, *Report and Order*, issued Nov. 22, 1983, pp. 56-57.

access charge as an interexchange carrier,"<sup>7</sup> and the Commission currently allows SWBT to charge its full Carrier Common Line rate in its wireless tariff.

23. The small companies only originate traffic to the wireless carriers in certain limited situations. It is neither lawful nor reasonable to include compensation for traffic from the small companies to the wireless carriers in a tariff proposed solely for a terminating service provided by the small companies. The tariffs at issue in this case are designed to establish a rate for the small companies and do not purport to (and indeed cannot) establish a rate for the wireless providers. The tariffs at issue do not constitute agreements containing reciprocal compensation provisions pursuant to the Telecommunications Act of 1996.

24. Call Blocking. The wireless carriers are currently delivering traffic to SWBT that is destined for the small companies' exchanges without the consent of the small companies, and the small companies have no way of stopping this traffic. Under approved tariffs and/or agreements, this wireless traffic was not supposed to be delivered to the small companies until the wireless carriers entered into agreements with the small companies.<sup>8</sup>

25. The small companies' tariffs provide the wireless carriers with the same 30 days' notice and opportunity to cure that are provided in the SWBT agreements. As a practical matter, the small companies cannot effectively block the wireless traffic themselves because it is co-mingled with other traffic when it arrives from SWBT. SWBT has provisions in its tariffs and/or agreements with the wireless providers that allow SWBT to terminate service if SWBT is not paid.

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<sup>7</sup> *In Re: The Matter of Southwestern Bell Telephone Company's Proposed Radio Common Carrier Tariff*, Case No. TR-90-144, *Report and Order*, p. 12.

<sup>8</sup> See *In the Matter of SWBT's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff*, P.S.C. Mo.-No. 40, Case No. TT-97-524, *Report and Order*, issued Dec. 23, 1997



26. Before blocking can occur, the small company must inform SWBT of the identity of the wireless carrier that is failing to pay for traffic being terminated. The small company should also inform SWBT that the terms and conditions of its tariff are being violated by the wireless carrier. It should thereafter be the responsibility of SWBT to implement the necessary blocking measures.

27. Billing Information. The small companies' tariffs provide that bills will be issued "based on the best information available" to the small companies, and the tariffs provide three options for billing. The first preference is to bill from the small companies' terminating records (if available). If those records are unavailable, the tariff allows the small company to accept either the Cellular Terminating Usage Summary Report ("CTUSR") or information provided from originating records of the wireless carriers.

### CONCLUSIONS OF LAW

1. State Law. Under Chapter 392 of Missouri's Revised Statutes, the Commission has authority over the rates and charges that are charged or collected by small telephone companies. These statutes require the Commission to set just and reasonable rates for telephone service. *State ex rel. AT&T v. Missouri Public Service Comm'n*, 701 S.W.2d 745, 749 (Mo. Ct. App. 1985)

2. Pursuant to Section 386.510 RSMo. 2000, an order of the PSC may be reviewed only for its lawfulness or reasonableness.

3. Federal Law. The FCC's pricing rules, including the provisions that require the use of forward-looking economic costs, apply only to negotiated or arbitrated reciprocal compensation agreements under the Act. They do not apply to tariffs filed in the absence of such

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agreements. Thus, the only requirement for the small companies' tariffed rates is that they must be just and reasonable. The small companies' proposed rates satisfy this test.

4. Intra-MTA Traffic. Missouri is divided into two Major Trading Areas (MTAs): one that covers roughly the eastern part of the state, and one that covers roughly the western part of the state. The FCC has determined that the MTA serves as the most appropriate definition for local service area for CMRS traffic, and intra-MTA traffic is treated as local traffic for purposes of reciprocal compensation under Section 251(b)(5) of the Act.<sup>9</sup>

5. The Federal Communications Commission's (FCC) reciprocal compensation pricing principles for intra-MTA traffic apply only to agreements approved pursuant to the Act. Absent an approved interconnection or reciprocal compensation agreement, the small companies may apply lawfully approved tariff rates.<sup>10</sup> There are no state law requirements regarding intra-MTA traffic. Because there are no approved interconnection or reciprocal compensation agreements between the small companies and the wireless carriers, there are no applicable federal or state law requirements regarding the termination of intra-MTA traffic for the tariffs.

6. Duty to negotiate reciprocal compensation arrangements. Upon receipt of a request to establish a reciprocal compensation arrangement under the Act, the small companies have an obligation to negotiate reciprocal compensation arrangements for the transport and termination of telecommunications.<sup>11</sup> Wireless carriers have the right to request such

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<sup>9</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, FCC 96-325, *First Report and Order*, 11 FCC Rcd 15499, issued Aug. 8, 1996, para. 1036.

<sup>10</sup> See Cole County Circuit Court Case Nos. CV198-178CC and CV198-261CC, *Findings of Fact, Conclusions of Law, and Judgment*, issued Feb. 23, 1999, pp. 8-9.

<sup>11</sup> See 47 USC 251(b)(5)

negotiations, and if the negotiations fail to produce agreement, then the Act provides that either carrier may petition the Commission to arbitrate any unresolved matters. Thus, even after the approval of the tariffs, the Act and each one of the tariffs provide a mechanism for the wireless carriers to establish a reciprocal compensation arrangement with the small companies just as they have done with SWBT.

7. The wireless carriers are not Local Exchange Carriers (“LECs”) under the Act, so they have no duty to establish reciprocal compensation arrangements with the small companies, nor do they have an obligation to negotiate such arrangements. However, the wireless companies do have obligations under Missouri law. Specifically, the wireless carriers have the obligation to establish compensation arrangements with the small companies *before* sending traffic that terminates in the small companies’ exchanges. This is what the Commission ordered in Case No. TT-97-524.

8. Regardless of these obligations, the wireless carriers and the small companies have been unable to reach compensation agreements for the termination of intra-MTA wireless traffic. In the meantime, this traffic continues to terminate to the small companies’ exchanges via SWBT. Thus, the Commission’s approval of the tariffs will allow the small companies to receive compensation for the termination of intra-MTA wireless traffic.

9. “Bill-and-Keep” is not an option. Some of the wireless carriers argue that they have a “bill-and-keep” compensation arrangement with the small companies, yet the wireless carriers pay nothing to the small companies for their wireless traffic that terminates to the small companies’ exchanges. The wireless carriers have not entered into any type of compensation arrangement with the small companies, and none of the small companies have agreed to a “bill-and-keep” arrangement with the wireless carriers.

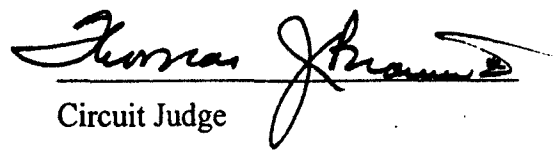
10. Single-issue ratemaking. Single issue ratemaking bars the Commission from allowing a public utility to change an existing rate without a consideration of all relevant factors. However, single issue ratemaking does not prohibit a company from introducing a new service and establishing a rate for that service. If this were not true, then the only way a new service could be offered would be via a rate case. Single-issue ratemaking is not applicable in this case. The service proposed by the small companies in this case is a new service that has been filed in the small companies' local exchange service tariffs. Because it is a new service and the small companies have no such service presently tariffed in their local exchange service tariffs, the prohibition against single issue ratemaking does not apply.

11. There is no current rate or tariff provision for the wireless termination service, and the wireless carriers have violated the intent of the Commission's *Order* in Case No. TT-97-524 "by sending wireless traffic in the absence of an agreement." The wireless carriers are unlawfully sending traffic without an agreement and without paying for it, and this situation cannot accurately be characterized as "an existing service." There can be no "increased rate" when there is no tariff rate for this service currently in place. Because the tariffs establish a rate for a new service, Missouri's bar against single issue ratemaking does not apply.

### JUDGMENT

Based on the foregoing Findings of Fact and Conclusions of Law, the Court holds that the Missouri Public Service Commission's February 8, 2001 *Report and Order* in Case No. TT-2001-139 is lawful and reasonable and supported by competent and substantial evidence upon the record and therefore it is affirmed in all respects.

SO ORDERED this 26<sup>th</sup> day of November, 2001.

  
Circuit Judge